Supreme Court, U.S.
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No. 96-906

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

JANETTE M. LOHMAN, et al.,

Petitioners,

v.

EVELYN SUSAN HAFLEY,

Respondent.

Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITIONERS' REPLY BRIEF TO BRIEF IN OPPOSITION

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1. Respondent incorrectly contends that the decision of the Eighth Circuit, that it lacked jurisdiction to impose the heightened pleading requirement, is mandated by *Johnson v. Jones*, __ U.S. __, 115 S.Ct. 2151 (1995). In fact, *Johnson* was not even cited by the Eighth Circuit in reaching its conclusion and is readily distinguishable from this case.

In *Johnson* this Court decided that circuit courts, reviewing the denial of summary judgment motions asserting qualified immunity, do not enjoy jurisdiction to review a "District Court's determination that the summary judgment record . . . raised a genuine issue of fact." 115 S.Ct. at 2156. This decision has no applicability to this case seeking review of the denial of a motion to dismiss.

In contrast, this case concerns only a legal question: Are courts required to impose a heightened pleading standard in suits brought against public officials or can they permit a case to be pled in a vague, notice format that prevents an effective qualified immunity analysis? The district court found the facts alleged insufficient to perform a qualified immunity analysis, but denied the motion to dismiss because it found that only notice pleading was required. Petitioners' Appendix (Pet. App.), A-9. The Eighth Circuit, by finding an absence of jurisdiction to reach that issue, announced a rule that not only affirms the district court's rejection of the heightened pleading standard in this case, but would also

preclude the appellate courts from reviewing such a holding in any case.

In order to preserve an essential part of an effective qualified immunity defense, it is important that this Court announce that no jurisdictional disability exists in this and similar cases. The issue raised here meets the three-part test, as set forth in *Johnson*, for appealable collateral orders. It (1) conclusively determines the disputed question, (2) resolves an important issue completely separate from the merits of the action, and (3) is effectively unreviewable on appeal from a final judgment. *Johnson*, 115 S.Ct. at 2155, *citing*, *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). The insufficiency of respondent's complaint with its attendant impact on the qualified immunity analysis must be addressed now or it will forever evade review. The district court denied the governmental defendants immunity from suit because it found an absence of sufficient facts to perform a qualified immunity analysis and refused to impose a heightened pleading standard. This is a final determination subject to *de novo* review by the appellate court using the same standard as the one that should have been employed by the district court. Imposition of a heightened pleading standard is not jurisdictionally barred.

Respondent attempts to salvage her jurisdictional argument by quoting from *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985), and asserting that an appellate court reviewing the denial of qualified immunity need not "determine whether the plaintiff's allegations actually state a claim." Brief in Opposition (Brf. Opp.), p. 9. But *Mitchell* is not the last word from this Court on that issue. As observed in *Siegert v. Gilley*, 500 U.S. 226, 232 (1991), "[a] necessary concomitant to a determination of whether the constitutional right asserted by the plaintiff is 'clearly established' at the

time the defendant acted is the determination of whether the plaintiff has asserted a constitutional right at all." At the motion to dismiss stage a qualified immunity analysis and a determination of whether a claim has been stated require the pleading of sufficient facts. And if a § 1983 plaintiff has failed to allege a violation of a constitutional right, then the plaintiff has necessarily failed to allege something more difficult to prove: a violation of a "clearly established" constitutional right. The appellate courts should not artificially avoid such issues and thereby subject the public to the burdens of non-meritorious litigation against government officials.

The Eleventh Circuit recently provided a good model in a *Pickering* balancing case. In *Williams v. Alabama State University*, No. 95-6432, 1997 WL 542 (11th Cir. Jan. 6, 1997), that court, in marked contrast to the Eighth Circuit, reversed a district court's denial of a motion to dismiss asserting qualified immunity. The appellate court found the greater specificity of the required amended complaint helpful in determining that the plaintiff had not asserted a violation of clearly established law and noted that "the employer is entitled to immunity except in the extraordinary case where Pickering balancing would lead to the inevitable conclusion that the discharge of the employee was unlawful." *Id.* at *6. Additionally, the court denied a motion to dismiss the appeal, finding that *Johnson* did not deny appellate court jurisdiction over the legal issue of the sufficiency of the plaintiff's pleadings; it was "part of the core qualified immunity analysis." *Id.* at n.4.

2. Given the dearth of facts contained in the complaint it is not surprising that respondent would belatedly attempt to add facts that do not appear in the pleading itself. While predictable, respondent's attempt is inappropriate.

Respondent asserts that she was ordered to hide "government records from an impending criminal investigation." Brf. Opp., p. 3. Tellingly, no citation to the complaint is given because no such allegation can be found in the complaint. *See* Pet. App., A-11 through A-19. Not only is there an absence of an allegation of an "impending" criminal investigation, the complaint fails to allege that either respondent or petitioner James was aware of such a non-existent investigation or that petitioner James ordered that the file be hidden "from" such an investigation. For all that is alleged in complaint, petitioner James could have been ordering the file hidden to secure it. A court cannot simply assume necessary but missing factual allegations. *Fisher v. Flynn*, 598 F.2d 663, 665 (1st Cir. 1979). *See also ACLU Foundation of Southern California v. Barr*, 952 F.2d 457, 472 (D.C. Cir. 1991) ("A court must take care not to put words into counsel's mouth by reading into the complaint factual allegations not fairly comprehended within what is actually asserted").

Similarly, respondent alleges in her Brief in Opposition, but not her complaint, that petitioners Lamb and Reuter "took no remedial action" when presented with an allegation that petitioner James had issued illegal instructions and petitioner Powell had affirmed them. Brf. Opp., p. 4. If respondent had wished to argue that petitioners Lamb and Reuter had breached a constitutional duty to take remedial action when informed of the allegedly illegal and rebuffed instructions, the same should have been pled and then a search for closely analogous case law could have been conducted to determine whether that supposed failure violated clearly established law. However, respondent's omission of this allegation (until the filing of her Brief in Opposition) prevented such analysis.

Finally, respondent makes one additional allegation for the first time in her Brief in Opposition. Respondent alleges that "immediately following Mrs. Hafley's speech . . . each of petitioners instituted various [retaliatory] actions against Mrs. Hafley." Brf. Opp. p. 4, emphasis added. This allegation, found nowhere in the complaint, is demonstrably false. The complaint discloses that on or about March 2, 1993, respondent engaged in her speech. Pet. App., A-15, ¶ 9. Petitioners Lohman and Hune could not have immediately begun to retaliate against respondent for this speech as they were not employed by the Department until April 26, 1993 and September 1, 1993, respectively. Respondent should not be permitted to oppose certiorari by supplementing her complaint at this stage with additional allegations, particularly ones that are patently false.

3. Respondent essentially concedes that the decision of the Eighth Circuit is inconsistent with that of the Sixth Circuit but asserts that this case is not appropriate for review because a resolution of the conflict would not be of general benefit. Brf. Opp., p. 7. Common sense dictates to the contrary.

In addition to the obvious injustice of subjecting governmental defendants to suit in the Eighth Circuit while permitting their early exit in similar circumstances in other circuits that properly apply a heightened pleading standard, the appellate opinion provides a blueprint for § 1983 plaintiffs wishing to avoid an early dismissal on qualified immunity grounds: merely draft a complaint that is so vague the court cannot tell "who did what." Once the opportunity for early dismissal is lost, the pressure mounts to settle the case, avoiding the serious problems that occur when the time of government officials is diverted to litigation instead of the provision of substantive services. This is the very problem

this Court recognized in *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

Respondent feigns concern that use of the heightened pleading standard would have a "draconian impact . . . on the dockets of the circuit . . . and district courts." Brf. Opp., p. 9. In reality, the opposite is true. Permitting vague complaints such as respondent's to proceed encourages the filing of an ever expanding number of equally vague § 1983 complaints. This is a result that the judiciary and the other branches of government rightly fear.

If the Eighth Circuit's principles are permitted to govern, a zealous advocate would be motivated to draft an intentionally vague complaint so that a court would make the necessary assumptions to avoid dismissal (e.g., the department head made certain outrageous statements that constituted "verbal harassment"), even if the advocate could not ethically have alleged the facts that the court would assume exist. The advocate's motivation is clear: by surviving the early motion to dismiss, the plaintiff's settlement leverage is considerably increased as the government begins to suffer harm from the diversion of resources from the business of the people to litigation.

These concerns are not hypothetical. States are often subjected to § 1983 complaints that name a host of state officials--including governors and department heads. The top officials almost always prevail, even when liability is found against a lower level state employee. But the Eighth Circuit opinion allows everyone to be lumped together under vague allegations. This tactic effectively defeats qualified immunity at the motion to dismiss stage, a right this Court affirmed just last term in *Behrens v. Pelletier*, ____ U.S. ____, 116 S.Ct. 834 (1996). Courts should not be permitted to make claim determinative and potentially false assumptions that

effectively circumvent a qualified immunity analysis. At a minium, a § 1983 complaint should plead enough information so that a court can determine, as to each defendant, whether there is a claim and whether qualified immunity bars the claim against that particular defendant.

This case shows how artful pleading that complies with only minimal "notice" requirements can subvert the qualified immunity doctrine. Respondent sued eleven state officials, including two persons who have headed a department critically important for any state (the Department of Revenue). The most specific allegation against the senior officials is as follows:

> [All eleven] Defendants, and each of them, individually and in concert, have retaliated against Plaintiff because of her refusal to commit the illegal conduct[.]

Pet. App. A-16, ¶ 15. Such an allegation says absolutely nothing about how the two department heads and other petitioners were involved in the activities in question.

The complaint goes on to allege several more allegedly wrongful acts, such as the issuance of negative evaluations, the assignment of menial tasks, and "verbal harassment" while respondent was at home. Pet. App., A-16. But respondent did not link any of these more specific allegations to any particular petitioner. Moreover, even these allegations are too vague to state a claim: there is no constitutional right to avoid menial tasks or to be free from negative evaluations or "verbal harassment" (whatever that may be).

In this case, as in most others, the heightened pleading standard can be easily and fairly applied. For instance, the

heightened pleading standard requires respondent to say who actually made the negative evaluations and what actions were taken by others to bring about such evaluations, if any. The same approach could be used for the assignment of menial tasks. The content of the alleged "verbal harassment" should be described and the person(s) who spoke the words should be identified. This approach would not only make clear which petitioners really belong in the case (if any), but would also allow an evaluation of the conduct that purportedly occurred (as opposed to the conduct the Eighth Circuit would assume occurred) to determine whether it violates the constitution.

The heightened pleading standard merely requires a plaintiff to state what the plaintiff will eventually have to reveal anyway: who did what to whom. This is not a novel concept. This Court recognized that claims against government officials have different consequences than those brought against private litigants. *Harlow*, 457 U.S. at 814. Only the heightened pleading standard can make qualified immunity meaningful at the motion to dismiss stage.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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